

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report Summary

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Hon. Joyce L. Kennard, Chair
Ben McClinton, Committee Counsel (415) 865-7711

DATE: March 20, 2000

SUBJECT: Rules on Appeal—Requests for Judicial Notice (adopt rule 14.5)
(Action Required)

Issue statement

A party may request that an appellate court take judicial notice of certain matter. (Evid. Code, § 459.) Sometimes such a request is presented in the text—or even in a footnote—of a brief or of an unrelated motion. Requests presented in this manner are difficult for the court to act upon, because it is unclear whether the request is intended to be a motion, which would require notice, hearing, and a ruling on the request.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective July 1, 2000, adopt rule 14.5 to require that a request for judicial notice in a cause pending before the Supreme Court or the Court of Appeal be made by a motion filed separately from a brief or other paper.

The text of the proposed new rule is attached at page 4.

Rationale for recommendation

Requiring that a request for judicial notice be made by a motion filed separately from a brief or other paper will alert the court and opposing counsel that a motion has been made and provide an orderly means for acting on the request.

Some districts of the Court of Appeal have already adopted local rules requiring a separate motion for these requests (e.g., Second Appellate District, Local Rules, rule 5). Other districts and the Supreme Court are considering adopting similar local rules. A

statewide rule would create procedural uniformity for making requests that the court take judicial notice.

The proposed rule requires that a proposed order should accompany the motion to give each court the choice of using that order or the court's own order. Some appellate courts in their local rules already require proposed orders for these requests.

Note: Because the procedure would apply only to a “cause pending” before an appellate court, the rule would not apply to petitions for review or to petitions for original writs. These petitions are excluded because the court otherwise would be forced to rule on the motion separately from the petition, even when the petition is being summarily denied.

Alternative actions considered

No reasonable alternative actions were apparent to the committee, and none were proposed by the commentators (except as noted in the comments section below).

Comments from interested parties

The proposals were regularly circulated for comment during the Winter 2000 comment period, December 23 through February 22 (item W00-4).

The Rules Amendments Subcommittee considered carefully the 14 comments that were submitted. All respondents but one favored the proposal. An attorney objected to the noticed motion proposal because requests in regard to “innocuous and/or noncontroversial” matters should be permitted without the need to file a motion. (He then, however, gave examples that do *not* require judicial notice, such as taking notice of a paper omitted from the record.) The committee continues to believe that the more usual requests for judicial notice should be made in a separate motion—and not in the briefs.

Three respondents suggested modifications to the rule. A bar association representative suggested that the rule be changed to state that “documentary materials to be judicially noticed should accompany the motion and be served on all parties to the appeal.” The committee agreed and added subdivision (c) to the proposed rule to require that the motion either include a copy of the “matter”¹ to be noticed or explain why it is not practicable to do so. (For example, the matter may be too voluminous or may be simply cited.)

¹ The committee chose the word *matter* because that is the general term used in Evidence Code sections 451–459 to refer to material that may be judicially noticed.

An appellate court clerk stated, “We are not sure why a proposed order should accompany the motion. Except for requests for extension of time, this court prepares its own orders.” The committee believes that the proposed order should accompany the motion to give each court the choice of using that order or the court’s own order.

A superior court clerk suggested that the rule should apply to petitions for review and original writs to “ensure uniformity of rules for the reviewing court.” The committee rejected the extension of the rule, because the court would then be forced to rule on the motion separately from the petition, even when the petition is being summarily denied.

Two respondents suggested that a similar rule should be adopted to apply to the appellate divisions of the superior court. The proposal to have a similar rule for appellate divisions will be considered in the project to rewrite all the appellate division rules.

A chart showing the comments and the committee’s responses is attached at pages 5–7.

Implementation requirements and costs

The courts and staff should have no need to take any significant measures to implement the recommendation, and no serious impediments to implementation are apparent. The recommended actions will result in no significant costs to the courts, to litigants, or to this office.

Attachments

RULE AMENDMENT

Requests for Judicial Notice

Rule 14.5 is added to the California Rules of Court effective July 1, 2000, to read:

1 **Rule 14.5. Requests for judicial notice**

2
3 **(a) [Motion required]** In a cause pending before the Supreme Court or a Court of
4 Appeal, a request that the court take judicial notice under Evidence Code
5 section 459 shall be made by a motion under rule 41 filed separately from a
6 brief or other paper.

7
8 **(b) [Proposed order]** The motion shall include a proposed order.
9

10 **(c) [Copy of matter to be noticed]** Unless the matter to be judicially noticed
11 already appears in the record on appeal, a copy of the matter shall be filed and
12 served with the motion, or the motion shall explain why it is not practicable to
13 do so.

Comments for
Rules on Appeal—Requests for Judicial Notice
(adopt Cal. Rules of Court, rule 14.5)

	Commentator	Position	Comment on Behalf of Group	Comments	Committee Response
1.	Leonard Sacks Attorney Granada Hills	N		The ability to request judicial notice in a brief without a formal motion is a convenience when the matter requested is innocuous and/or non-controversial (for example, some paper in the file was omitted from the record, but becomes relevant, or the request applies to a minor point). Requiring a notice just adds to the costs charged to the client.	The “innocuous and/or noncontroversial” matters noted in the comment do not require a request for judicial notice. They can be remedied by an application to the court to correct or modify the record. The committee continues to believe that the more usual requests for judicial notice should be made in a separate motion—and not in the briefs.
2.	Hon. Phrasel L. Shelton Rules Committee Chair San Mateo County Superior Court	A	Yes	No specific comments.	N/A
3.	James C. Martin, Chair Los Angeles County Bar Association Committee on Appellate Courts	AM	Yes	<p>The Committee is in favor of this rule change to standardize the approach taken to judicial notice requests. We would, however, like the Appellate Advisory Committee to consider two additions to this rule.</p> <p>The first would be to add a second paragraph providing that: “Unless good cause is shown, documentary materials to be judicially noticed should accompany the motion and be served on all parties to the appeal and filed with the court.” We anticipate that “good cause” would include circumstances where the documents are voluminous. Absent such circumstances, however, the parties and court should</p>	The Appellate Advisory Committee agrees and has proposed an additional provision to the rule (subd. (c)) requiring that a copy of the matter requested to be noticed be filed and served with the motion, or the motion must explain why that is not practicable.

Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

	Commentator	Position	Comment on Behalf of Group	Comments	Committee Response
				<p>be provided with copies of the materials to be judicially noticed in order to fashion to an appropriate response.</p> <p>As far as the second change, we believe that the wording of the second sentence of the proposed new rule should be changed slightly. The second sentence should say: "The motion shall be accompanied by a proposed order." A third sentence then should be added which provides: "The motion and proposed order also shall be served on all other parties and filed with the court."</p>	The Appellate Advisory Committee agrees and has made a change to the rule to clarify that the motion must include a proposed order when filed and served.
4.	Robert L. Liston Clerk-Administrator Court of Appeal, Third Appellate District	AM	Yes	We strongly agree with the proposed rule. For many years it has been the practice of the clerk's office when responding to an inquiry about a motion for judicial notice to strongly suggest to counsel and litigants that they file a separate motion pursuant to rule 41 and not include the motion within their brief. We are not sure why a proposed order should accompany the motion. Except for requests for extension of time, this court prepares its own orders.	The proposed order should accompany the motion to allow each court the choice of using that order or the court's own order, depending on the court's preferred practice.
5.	Hon. Mary E. Fuller, Judge San Bernardino County Superior Court	A		No specific comments.	N/A
6.	Dennis Peter Maio, Member Committee on Administration of Justice	A		No specific comments.	N/A
7.	A. Mestman Research Attorney San Diego Superior Court	AM		My suggestion would be to have a similar rule for appellate divisions.	The proposal to have a similar rule for appellate divisions will be considered in the project to rewrite all the appellate division rules.

Positions: A = Agree; AM = Agree only if modified; N = Do not agree

	Commentator	Position	Comment on Behalf of Group	Comments	Committee Response
8.	Sharol H. Strickland Court Executive Officer Butte County Superior Court	A		No specific comments.	N/A
9.	Darin L. Wessel, Co-chair, Civil Rules Subcommittee, Appellate Courts Committee, San Diego County Bar Association	A	Yes	The Appellate Courts Committee of the San Diego County Bar Association approves of the proposed rule change regarding Request for Judicial Notice on Appeal (W00-4).	N/A
10.	Alice Lopez Manager-Court Programs Ventura County Superior Court	AM		This should apply to Petitions for review and original writs. This would ensure uniformity of rules for the reviewing court.	The committee disagrees, because if this proposal applied to petitions for review and for original writs, the court would then be forced to rule on the motion separately from the petition even when the petition is being summarily denied.
11.	Julie Ann Burton Yolo County Superior Court	A		No specific comments.	N/A
12.	Hannah Inouye John A. Clarke Los Angeles County Superior Court		Yes	This proposed rule change has no effect on the Superior Court. Shouldn't this requirement also apply to rules on appeal to the Appellate Divisions?	The proposal to have a similar rule for appellate divisions will be considered in the project to rewrite all the appellate division rules.
13.	Hon. Ronald L. Bauer, Judge Orange County Superior Court, Rules and Forms Committee	A	Yes	The proposal has no impact upon the Orange County Superior Court.	N/A
14.	Pamela E. Dunn, Chair State Bar Committee on Appellate Courts	AM	Yes	[T]he Committee wants the drafters to know that there is general confusion about whether a request for judicial notice must include [everything] the trial court judicially noticed. Some guidance on this topic in the Advisory Notes would be helpful.	Evidence Code section 459 makes it clear that "each matter" means everything the trial court judicially noticed.

Positions: A = Agree; AM = Agree only if modified; N = Do not agree